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AND
BRIEF

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In the Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SW GENERAL, INC., DBA SOUTHWEST AMBULANCE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

Table Of Authorities II

Interest Of *Amicus Curiae* 1

Introduction And Summary Of Argument 2

Argument 4

I. The FVRA Ensures The President Does Not Bypass The Senate's Advice And Consent Role In Nominations 4

II. By Its Plain Terms, § 3345(b)(1) Limits An Individual's Ability To Serve Temporarily As An Acting Official Under § 3345(a)(2) Or (a)(3) 10

A. The Government's Interpretation Turns The Term "Notwithstanding" On Its Head 10

B. The Plain Meaning Of "A Person" In Subsection (b)(1) Makes Clear That It Applies To Individuals Other Than First Assistants Serving Under Subsection (a)(1) 19

C. The Plain Meaning Of "This Section" Establishes That Subsection (b)(1) Applies To Subsections (a)(2) And (a)(3) 21

Conclusion 23

TABLE OF AUTHORITIES

Cases: **Page(s)**

Am. Bus Ass'n v. *Slater*,
231 F.3d 1 (D.C. Cir. 2000) 19

Engine Mfrs. Ass'n v. *S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004)..... 15-16

Hooks v. *Kitsap Tenant Support Servs., Inc.*,
816 F.3d 550 (9th Cir. 2016) 3, 14, 22

Hooks v. *Kitsap Tenant Support Servs., Inc.*,
No. C13-5470-BHS, 2013 WL 4094344 (W.D. Wash. Aug. 13, 2013)..... 4

Hooks v. *Remington Lodging & Hosp., LLC*,
8 F. Supp. 3d 1178 (D. Alaska 2014) 3

In re Cardelucci,
285 F.3d 1231 (9th Cir. 2002) 19

Jama v. *Immigration & Customs Enf't*,
543 U.S. 335 (2005) 13

Kingdomware Techs., Inc. v. *United States*,
136 S. Ct. 1969 (2016) 13

Koons Buick Pontiac GMC, Inc. v. *Nigh*,
543 U.S. 50 (2004) 21

Lawson v. *FMR LLC*,
134 S. Ct. 1158 (2014) 11

Mohamad v. *Palestinian Auth.*,
132 S. Ct. 1702 (2012) 19

Moskal v. *United States*,
498 U.S. 103 (1990) 11

Cases—continued: **Page(s)**

Pfizer v. *Gov't of India*,
434 U.S. 308 (1978) 19

Powerex Corp. v. *Reliant Energy Servs., Inc.*,
551 U.S. 224 (2007) 14, 20, 22

Rapanos v. *United States*,
547 U.S. 715 (2006) 20

Rumsfeld v. *Padilla*,
542 U.S. 426 (2004) 20

Shomberg v. *United States*,
348 U.S. 540 (1955) 12-13

Sosa v. *Alvarez-Machain*,
542 U.S. 692 (2004) 17, 20

Touby v. *United States*,
500 U.S. 160 (1991) 5

U.S. Telecom Ass'n v. *F.C.C.*,
359 F.3d 554 (D.C. Cir. 2004) 5

Statutes and Rules:

5 U.S.C. § 3345 ..... *passim*

5 U.S.C. § 3345(a) 1, 4, 14, 17

5 U.S.C. § 3345(a)(1) ..... *passim*

5 U.S.C. § 3345(a)(2) ..... *passim*

5 U.S.C. § 3345(a)(3) ..... *passim*

5 U.S.C. § 3345(b) 1, 2

5 U.S.C. § 3345(b)(1) ..... *passim*

5 U.S.C. § 3345(c)(1) 13, 14, 17, 20

5 U.S.C. § 3345(c)(2) 17, 22

Statutes and Rules—continued: **Page(s)**

5 U.S.C. § 3347(a) 18, 22
5 U.S.C. § 3348(b) 22
5 U.S.C. § 3348(c) 22
5 U.S.C. § 3348(d)(1) 22
5 U.S.C. § 3349(a)(1) 22
5 U.S.C. § 3349(b) 22
5 U.S.C. § 3349a(a) 22
5 U.S.C. § 3349b 22
5 U.S.C. § 3349c 22
5 U.S.C. § 3349d(a) 22
5 U.S.C. § 3349d(b) 22
7 U.S.C. § 6d 18
8 U.S.C. § 318 12
8 U.S.C. § 405(a) 12
8 U.S.C. § 405(b) 12
10 U.S.C. § 125(a) 18
10 U.S.C. § 125(b) 18
10 U.S.C. § 125(c) 18
15 U.S.C. § 80a-17(a) 18
15 U.S.C. § 80a-17(b) 18
15 U.S.C. § 80a-17(c) 18
15 U.S.C. § 80a-56 18
29 U.S.C. § 153(d) 6
33 U.S.C. § 1361(a) 7
42 U.S.C. § 1395kkk(g)(2)(A) 16

Statutes and Rules—continued: **Page(s)**

42 U.S.C. § 6912(a)(1) 7

42 U.S.C. § 7601(a) 7

54 U.S.C. § 304101(c) 16

29 C.F.R. § 102.31(d) 6

40 C.F.R. § 1.23 7

40 C.F.R. § 21.5 7

Other Authorities:

The American Heritage Dictionary of the English Language (3d ed. 1992) 11

M. Douglass Bellis, *Statutory Structure and Legislative Drafting Conventions: A Primer for Judges* (2008) 21, 22

Black's Law Dictionary (10th ed. 2014) 11

145 Cong. Rec. 6764 (1999) 6

57 Fed. Reg. 26894 (June 16, 1992) 7

62 Fed. Reg. 13522 (Mar. 20, 1997) 8

62 Fed. Reg. 13938 (Mar. 24, 1997) 8

64 Fed. Reg. 40777 (July 28, 1999) 8

65 Fed. Reg. 7753 (Feb. 16, 2000) 8

65 Fed. Reg. 24531 (Apr. 26, 2000) 9

65 Fed. Reg. 24533 (Apr. 26, 2000) 9

69 Fed. Reg. 11652 (Mar. 11, 2004) 9

69 Fed. Reg. 22559 (Apr. 26, 2004) 9

74 Fed. Reg. 10120 (Mar. 9, 2009) 9

74 Fed. Reg. 36614 (July 24, 2009) 8

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74 Fed. Reg. 38974 (Aug. 5, 2009) 8

78 Fed. Reg. 19434 (Apr. 1, 2013) 7

79 Fed. Reg. 52355 (Sept. 3, 2014) 9

80 Fed. Reg. 26189 (May 7, 2015) 5, 8

Bryan Garner, *Garner's Modern American Usage* (3d ed. 2009) 11

James L. Gattuso & Diane Katz, *Red Tape Rising: Obama Regs Top $100 Billion Annually* (May 2016), at https://goo.gl/ofrzqQ 6

Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* (2012) 11

Securement of Unattended Equipment, Docket No. FRA-2014-0032, Notice No. 2 (July 27, 2015) 7

INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. The Chamber thus regularly files *amicus curiae* briefs in cases raising issues of vital concern to the Nation's business community, including cases involving challenges to federal agency action, such as action by the National Labor Relations Board.

This case concerns the Federal Vacancies Reform Act ("FVRA"), 5 U.S.C. § 3345, *et seq.*, which limits when a nominee for a vacant office may also serve temporarily as the acting official for that same office. The question presented is whether § 3345(b)'s limitation applies to all temporary officials serving under 5 U.S.C. § 3345(a), or whether it applies only to the narrower class of officials who assume acting responsibilities under Subsection (a)(1) because they act as first assistants to the vacant office. Although this case specifically addresses when the Acting General Counsel of the National Labor Relations Board (the

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[1] No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, and its counsel made any monetary contribution to its preparation and submission. The parties have consented to this filing.

"NLRB" or the "Board") may lawfully assume such responsibilities, the question is of far broader significance to the Chamber, whose members are subject to regulation and enforcement by the NLRB and many other federal agencies governed by the FVRA.

In a well-reasoned and thorough decision, the D.C. Circuit gave effect to the plain language of § 3345(b), limiting the circumstances in which the NLRB's Acting General Counsel may lawfully serve pursuant to § 3345(a)(2) or (a)(3), while also being the President's nominee for that office. As the largest representative of employers in the United States, the Chamber has a vital interest in ensuring that the NLRB at all times is acting within its authority when it discharges its duties, and that the Senate plays a meaningful role in providing advice and consent on the President's nominees for offices at the NLRB and myriad other agencies.

INTRODUCTION AND SUMMARY OF ARGUMENT

The FVRA establishes rules for temporarily filling vacancies that require presidential appointment and Senate confirmation ("PAS" positions). It gives the President limited authority to appoint acting officers to serve temporarily in those positions, while restricting that temporary service to preserve the Senate's advice-and-consent role. Subsection (a)(1) sets the default rule for succession, providing that the first assistant "shall" become the acting officer. 5 U.S.C. § 3345(a)(1). The President may override that automatic succession rule by either directing an individual who already holds a different PAS position to serve as the acting officer, *id.* § 3345(a)(2), or direct-

ing a senior employee within the same agency to serve as the acting officer, *id.* § 3345(a)(3). Congress included § 3345(b)(1) to prevent the President from using acting service as a way to evade the Senate's advice-and-consent role. It provides that, "[n]otwithstanding subsection (a)(1), a person may not serve as an acting officer for an office under this section, if" that person did not serve as first assistant to the vacant office for 90 days of the preceding year and has been nominated to that office. 5 U.S.C. § 3345(b)(1).

Subsection (b)(1)'s limitation is important given the vast power that acting officers wield. Such officials can occupy the highest reaches of government agencies. Despite their "acting" status, such officials can issue final rules with nationwide effect, approve statewide regulatory regimes, and make individual case determinations about the applicability of regulations that have profound effects on businesses and individuals.

The text of Subsection (b)(1) unambiguously applies to persons serving under Subsections (a)(2) and (a)(3), as well as (a)(1). Congress made three specific choices in the language of Subsection (b)(1) that make that meaning plain—beginning it with a "notwithstanding" clause, using the broad term "a person," and specifying that its limitation applied to "this section." Indeed, every federal judge to consider the issue has concluded that the plain text of § 3345(b)(1) unambiguously limits an individual's ability to serve temporarily as an acting officer pursuant to § 3345(a)(2) or (a)(3), and not just (a)(1). See Pet. App. 12a-20a; *Hooks* v. *Kitsap Tenant Support Servs., Inc.*, 816 F.3d 550, 558-64 (9th Cir. 2016); *Hooks* v. *Remington Lodging & Hosp., LLC*, 8 F. Supp. 3d

1178, 1187-89 (D. Alaska 2014); *Hooks* v. *Kitsap Tenant Support Servs., Inc.*, No. C13-5470-BHS, 2013 WL 4094344, at *2 (W.D. Wash. Aug. 13, 2013). This Court should reach the same conclusion.

ARGUMENT

I. The FVRA Ensures The President Does Not Bypass The Senate's Advice And Consent Role In Nominations

One of the FVRA's core purposes is preventing the President from installing an officer of the United States to a PAS position without the Senate's constitutional check of advice and consent. Resp. Br. 11-14. The FVRA's reforms are a critical safeguard for the separation of powers and guard against executive aggrandizement in the myriad areas in which executive officers are vested with authority to take actions with the force of law. The range of officials subject to the FVRA is as broad as the Executive Branch itself. Absent faithful application of the FVRA's limitations on acting service, the President could install his chosen officials without Senate approval; those officials could then take a wide range of actions carrying the force of law, subjecting businesses and individuals nationwide to regulations, enforcement actions, and other agency determinations with serious real-world consequences. Acting officials who are permanent nominees are more likely than temporary caretakers to be emboldened to take significant actions to advance the President's agenda.

It is difficult to overstate the broad universe of offices subject to the FVRA, or the scope of practical and legal consequences that would result from the government's proposed interpretation of that statute.

By its terms, the FVRA applies to any "officer of an Executive agency," defined to include those in "the Executive Office of the President," whose appointment "is required to be made by the President, by and with the advice and consent of the Senate." 5 U.S.C. § 3345(a). The FVRA thus applies to all of the officials who lead agencies responsible for regulating virtually every sector of the U.S. economy, from the Environmental Protection Agency ("EPA") and Department of Health and Human Services to the Departments of Homeland Security, Commerce, and State, as well as the Office of Management and Budget. By statute, those serving in covered offices exercise a vast range of authority. In addition, most federal agency heads and other principals have standing delegations of authority to subordinates via "internal delegations and appointments of authority." Approval and Promulgation of Air Quality Implementation Plans, 80 Fed. Reg. 26189, 26189-26190 (May 7, 2015); see *U.S. Telecom Ass'n* v. *F.C.C.*, 359 F.3d 554, 565 (D.C. Cir. 2004) (finding such subdelegation "presumptively permissible"); see *Touby* v. *United States*, 500 U.S. 160, 169 (1991) (upholding Attorney General's power to subdelegate).[2]

As a result, acting officials covered by the FVRA and operating at many different levels of an agency's internal organization often wield significant authority, making the Senate's advice-and-consent role cru-

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[2] Many agencies do not make their subdelegations readily available to the public. For instance, the EPA Delegations Manual, which outlines EPA's general methods of delegating powers and functions within the agency, is not readily available to the public, yet EPA frequently invokes it to defend subordinate officials' actions. *E.g.*, 80 Fed. Reg. at 26190.

cial. Even a few examples illustrate the importance of ensuring the President is not able to bypass the Senate by readily resorting to the use of acting officials.

1. To begin with the example presented in this case, the NLRB's General Counsel has substantial enforcement powers under the National Labor Relations Act. The General Counsel exercises "general supervision" over NLRB attorneys and "the regional offices," as well as "final authority * * * in respect of the investigation of charges and issuance of [unfair labor practice] complaints." 29 U.S.C. § 153(d). The General Counsel brings enforcement proceedings against those who do not comply with Board-issued subpoenas. See 29 C.F.R. § 102.31(d). Simply responding to such an investigation—to say nothing of defending against charges if a complaint is issued—can impose substantial costs on employers, sometimes resulting in tens if not hundreds of thousands of dollars in legal fees.[3]

Other acting officials can exercise similarly broad powers. To take another example from among the positions the government acknowledges were filled based on its flawed and aggressive reading of the FVRA, see Pet. Br. App. 74a, the Deputy Administrator of the EPA can wield essentially the entire authority of the Administrator, which includes some of the most far-reaching, burdensome, and controversial regulatory schemes in the U.S. Code. *E.g.*, 42 U.S.C.

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[3] See, *e.g.*, 145 Cong. Rec. 6764 (1999) (reporting that a single employer "had to spend more than $600,000 in legal fees from one salting campaign, with the average cost per charge of more than $8,500").

§ 7601(a) (rulemaking authority under Clean Air Act); *id.* § 6912(a)(1) (same, Resource Conservation and Recovery Act); 33 U.S.C. § 1361(a) (Clean Water Act); see generally James L. Gattuso & Diane Katz, *Red Tape Rising: Obama Regs Top $100 Billion Annually* (May 2016), at https://goo.gl/ofrzqQ (EPA regulations promulgated in 2015 alone increased regulatory costs by $11.1 billion, according to EPA's own calculations). By regulation, the Deputy Administrator has blanket authority to "assist[] the Administrator in the discharge of Agency duties and responsibilities," and can even "serve[] as Acting Administrator." 40 C.F.R. § 1.23. Under that authority, Acting Deputy Administrators have taken a lead role in notice-and-comment rulemaking, including in notoriously controversial areas such as the scope of federal jurisdiction under the Clean Water Act.[4] And by regulation, the Deputy Administrator has authority over all appeals by small business owners regarding whether they have complied with EPA standards. See 40 C.F.R. § 21.5. That kind of substantive rulemaking authority and important decisionmaking power underscores the need for Senate advice and consent. Statutes, regulations, and internal agency memoranda charge scores of other officials at the NLRB, EPA, and other agencies with comparable powers.

2. One need look no further than the Federal Register to see that acting officials routinely take actions that carry the force of law and have real-world consequences for businesses and individuals. For starters, acting officials often issue or approve substantive

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[4] See, *e.g.*, Proposed Rule for the Clean Water Act Regulatory Programs of the Army Corps of Engineers and the Environmental Protection Agency, 57 Fed. Reg. 26894 (June 16, 1992).

regulations. They routinely propose[5] and issue final rules with nationwide effect,[6] and respond to comments made in the rulemaking process.[7] They also issue authoritative guidelines for implementing federal programs,[8] and approve state regulatory regimes that are subject to federal standards.[9]

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[5] Effluent Limitations Guidelines and Standards for the Construction and Development Point Source Category, 78 Fed. Reg. 19434 (Apr. 1, 2013) (issued by Acting Administrator of EPA).

[6] See, *e.g.*, Securement of Unattended Equipment, Docket No. FRA-2014-0032, Notice No. 2 (July 27, 2015) (Acting Administrator of Federal Railroad Administration issues final rule on unattended railroad equipment); Requirements and Procedures for Consumer Assistance To Recycle and Save Program, 74 Fed. Reg. 38974 (Aug. 5, 2009) (Acting Deputy Administrator of NHTSA issues final rule governing federal automobile exchange and disposal program); Rules of Practice for Motor Carrier Proceedings; Violations of Commercial Regulations, 65 Fed. Reg. 7753 (Feb. 16, 2000) (Acting Deputy Administrator of FMCSA issues final rule governing various aspects of proceedings under the ICC Termination Act of 1995); Motor Vehicle Content Labeling, 64 Fed. Reg. 40777 (July 28, 1999) (Acting Deputy Administrator of NHTSA adopts final rule concerning labeling required for passenger vehicles); Consolidation, Elimination, and Clarification of Various Regulations, 62 Fed. Reg. 13938 (Mar. 24, 1997) (Acting Deputy Administrator of DEA issues final rule making numerous changes to federal regulations covering "the pharmaceutical, chemical, and health care industries").

[7] Elimination of Route Designation Requirement for Motor Carriers Transporting Passengers Over Regular Routes, 74 Fed. Reg. 36614 (July 24, 2009).

[8] See, *e.g.*, Guidelines for Implementing the Hardship Grants Program for Rural Communities, 62 Fed. Reg. 13522 (Mar. 20, 1997) (Acting Assistant Administrator of EPA issues guidelines governing "a $50 million grant program").

[9] See, *e.g.*, Approval and Promulgation of Air Quality Implementation Plans, 80 Fed. Reg. at 26189-26190 (Acting EPA Re-

Acting officials also make individual adjudicatory determinations of profound importance for businesses and individuals. For instance, they routinely decide whether to grant regulatory waiver requests,[10] or applications for regulatory exemptions.[11] They also approve or deny applications for certifications that are necessary for certain businesses.[12] These decisions are highly significant to the individuals and entities affected by them.

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gional Administrator approves New Mexico's State Implementation Plan, pursuant to Federal Clean Air Act).

[10] See, *e.g.*, Notice of Regulatory Waiver Requests Granted for the Second Quarter of Calendar Year 2014, 79 Fed. Reg. 52355, 523356-52358 (Sept. 3, 2014) (reporting three decisions to waive regulations, made by various "[a]cting" officials of the Office of Community Planning and Development)

[11] See, *e.g.*, Parts and Accessories Necessary for Safe Operation; General Motors Corporation's Exemption Application; Minimum Fuel Tank Fill Rate and Certification Labeling, 65 Fed. Reg. 24531 (Apr. 26, 2000) (Acting Deputy Administrator of FMCSA grants GM's application for exemption from certain fuel tank design and certification labeling requirements); Controlled Substances and Alcohol Use and Testing; PacifiCorp Electric Operations' Exemption Application; Random Testing of Drivers, 65 Fed. Reg. 24533 (Apr. 26, 2000) (Acting Deputy Administrator of FMCSA denies company's application for exemption from requirement of random substance and alcohol tests); Commercial Driver's License: Commonwealth of Virginia, Department of Motor Vehicles; Application for Exemption, 74 Fed. Reg. 10120 (Mar. 9, 2009) (Acting Deputy Administrator of FMCSA grants Virginia's application for an exemption allowing it to accept black and white photographs on commercial driver's licenses).

[12] See, e.g., Denial of Application, 69 Fed. Reg. 22559 (Apr. 26, 2004) (Acting Deputy Administrator of DEA denies certification for small business owner planning to distribute various cough medicines to gas stations); Denial of Application, 69 Fed. Reg. 11652 (Mar. 11, 2004) (same, denial of certification for applicant planning to distribute to gas stations and convenience stores).

There is thus every reason to believe that Congress intended to protect the Senate's primary role in providing advice and consent as to the officers who wield such wide-ranging powers.

II. By Its Plain Terms, § 3345(b)(1) Limits An Individual's Ability To Serve Temporarily As An Acting Official Under § 3345(a)(2) Or (a)(3)

The plain language of the statute confirms this understanding. Section 3345(b)(1) states that "[n]otwithstanding subsection (a)(1), a person may not serve as an acting officer for an office under this section, if" that person did not serve as first assistant to the vacant office for 90 days of the preceding year and has been nominated to that office. 5 U.S.C. § 3345(b)(1). Three features of that language—the use of "[n]otwithstanding," "a person," and "this section"—make clear that Subsection (b)(1) applies to individuals acting as temporary officers under Subsections (a)(2) and (a)(3), as well as those serving under Subsection (a)(1).

A. The Government's Interpretation Turns The Term "Notwithstanding" On Its Head

1. The Plain Meaning Of "Notwithstanding" Requires An Expansive Application Of Subsection (b)(1)

The government's textual argument focuses primarily—almost exclusively—on the opening dependent clause of Subsection (b)(1). See Pet. Br. 26-37. But the government's argument skips over what the word "notwithstanding" actually means. The plain meaning of "notwithstanding" prevents Subsection (a)(1) from limiting Subsection (b)(1) , as the government contends.

When interpreting a statute, this Court "look[s] first to its language, giving the words used their ordinary meaning." *Lawson* v. *FMR LLC*, 134 S. Ct. 1158, 1165 (2014) (quoting *Moskal* v. *United States*, 498 U.S. 103, 108 (1990)). The ordinary meaning of "notwithstanding" is "in spite of" or "despite." *Black's Law Dictionary* 1230 (10th ed. 2014); accord Bryan Garner, *Garner's Modern American Usage* 575 (3d ed. 2009) ("despite," "in spite of," or "although"); *The American Heritage Dictionary of the English Language* 1238 (3d ed. 1992) ("In spite of:" "All the same; nevertheless:" "In spite of the fact that; although"). By that ordinary meaning, the opening clause provides that the restrictions in Subsection (b)(1) should apply *in spite of* what Subsection (a)(1) says. In other words, Subsection (a)(1) does not limit the application of Subsection (b)(1).

In the statutory context, "*[n]otwithstanding* performs a function opposite that of *subject to*. A dependent phrase that begins with *notwithstanding* indicates that the main clause that it introduces or follows derogates from the provision to which it refers." Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 126 (2012). Thus, when an opening clause uses the term "notwithstanding" in reference to a prior provision, it is ensuring that the main clause it introduces is not limited by that prior provision. *Ibid.* (noting the "superordinating" function of the term "notwithstanding").

The government's interpretation of Subsection (b)(1) turns the term "[n]otwithstanding" on its head by reading it to *restrict* the meaning of Subsection (b)(1). Indeed, the government reads "[n]otwithstanding subsection (a)(1)" to mean that

Subsection (b)(1) applies "*only* to persons who automatically assume acting status based on the general rule in Subsection (a)(1)." Pet. Br. 14 (emphasis added). In effect, it gives "notwithstanding" the *opposite* of its ordinary meaning. Tellingly, the government cannot point to a single definition of "notwithstanding," or any instance of everyday usage, that supports its backwards interpretation of "notwithstanding" as a term of limitation. See Pet. Br. 20-55. Nor has it identified any decisions from this Court—or any other—adopting that idiosyncratic approach.

In fact, this Court's precedent is to the contrary. *Shomberg* v. *United States*, 348 U.S. 540 (1955), rejected a similarly misguided construction of an opening "notwithstanding" clause. *Shomberg* involved the Immigration and Nationality Act of 1952 and addressed the interaction of a savings clause that preserved the validity of existing immigration documents (Section 405(a)), a non-retroactivity provision specifying that a petition for naturalization would be determined under the law in effect at the time of its filing (Section 405(b)), and a provision saying that "[n]otwithstanding the provisions of section 405(b)," "no petition for naturalization shall be finally heard" if a deportation proceeding was then pending (Section 318). The petitioner argued that Section 318 had no application to the savings clause in Section 405(a) because Section 318 mentioned only Section 405*(b)*. *Id.* at 543. While acknowledging that the "notwithstanding clause" "at first glance might indicate that it was intended not to apply to § 405(a)," the Court deemed that position "untenable," concluding that Congress's "intent is plain enough" that Section 318 "super-

sede[d] rights" under both Sections 405(a) and (b). *Id.* at 545.

This Court should reach the same conclusion here and reject the government's attempt to subvert the plain meaning of Subsection (b)(1)'s "notwithstanding" clause.

2. The Statutory Context Confirms The Plain Meaning Of "Notwithstanding" In Subsection (b)(1)

An examination of the statutory context underscores this reading. First, giving "notwithstanding" its plain meaning in Subsection (b)(1) would be consistent with the principle that, when used "in contraposition," the term "may" is permissive and the term "shall" is mandatory. *Jama* v. *Immigration & Customs Enf't*, 543 U.S. 335, 346 (2005); see *Kingdomware Techs., Inc.* v. *United States*, 136 S. Ct. 1969, 1977 (2016) ("When a statute distinguishes between 'may' and 'shall,' it is generally clear that 'shall' imposes a mandatory duty."). Subsection (a)(1) uses "shall" to establish a default rule whereby the first assistant temporarily assumes the responsibilities of the officer. 5 U.S.C. § 3345(a)(1). Then Subsections (a)(2), (a)(3), and (c)(1) establish circumstances where the President "*may* direct" someone other than the first assistant to be the acting officer: a PAS official, *id.* § 3345(a)(2) (emphasis added), or an employee who has attained at least a GS-15 pay grade and 90 days' service in the agency, *id.* § 3345(a)(3). Subsection (b)(1) then specifies when individuals "may not serve" under § 3345. *Id.* § 3345(b)(1). As the Ninth Circuit recognized, it is logical that each subsection using the permissive verb "may" would open with the

phrase "[n]otwithstanding subsection (a)(1)"[13] to make clear that the mandatory "shall" in Subsection (a)(1) does not override it. See *Hooks*, 816 F.3d at 560. Thus, interpreting the "notwithstanding" clauses to mean "in spite of" conforms to the use of "may" and "shall" in the statute.

This understanding of the contrast between permissive and mandatory language makes clear why the government is wrong to suggest that the D.C. Circuit's reading "renders that specific language superfluous." Pet. Br. 37. As the Ninth and D.C. Circuits agreed, the plain meaning of "notwithstanding" gives effect to the "notwithstanding" clause in Subsection (b)(1)—along with the similar clauses in Subsections (a)(2), (a)(3), and (c)(1)—because they all clarify the "order of operations" between those subsections and subsection (a)(1). See Pet. App. 14a; *Hooks*, 816 F.3d at 560 ("The 'notwithstanding' language, as used in (a)(2), (a)(3), and (b)(1), simply provides that, although that default rule exists, these other provisions still apply.").

Second, giving "notwithstanding" its plain meaning in Subsection (b)(1) follows the "principle * * * that identical words and phrases within the same statute should normally be given the same meaning." *Powerex Corp.* v. *Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007). As explained above, the D.C. Circuit's reading ensures that the mandatory "shall" in Subsection (a)(1) does not override the permissive "may" in the other subsections (or the equally manda-

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[13] Of course, Subsections (a)(2) and (a)(3) refer to "paragraph (1)" instead of "subsection (a)(1)," because they are also under the heading of Subsection (a). See 5 U.S.C. § 3345(a)(2), (3). But the meaning is the same.

tory "may not" in subsection (b)(1)). See Pet. App. 14a-15a. The government's proposed interpretation, by contrast, gives the "notwithstanding" clause in (b)(1) a very different meaning than the term has throughout Subsection (a). The government *claims* that it reads all the "notwithstanding" clauses "consistently with each other, as carving out an exception to the default rule that the first assistant shall perform the duties of the vacant office." Pet. Br. 22. But under the government's reading, Subsection (b)(1) is the only provision that applies *only* to Subsection (a)(1): It never claims that the "[n]otwithstanding" clauses of Subsections (a)(2) and (a)(3) limit their application in the same way.

For good reason. Under that approach, the President's discretionary power under Subsections (a)(2) and (a)(3) could be used *only* to replace the first assistant serving automatically under Subsection (a)(1). And that would mean that the President could not (for example) exercise his discretion under Subsection (a)(2) to replace a temporary officeholder whom the President previously directed to act under Subsection (a)(3)—despite Subsection (a)(2)'s clear authorization that he "*may* direct" a PAS official to act in the vacant office. Such a position cannot be squared with the plain language of those subsections.

The government's reliance on the negative-implication canon, and the fact that Subsection (b)(1) references "Subsection (a)(1)" alone, is misplaced. See Pet. Br. 28-30. That argument overlooks the fact that, given their substantive differences, Subsection (b)(1) does not need a broader "notwithstanding" clause to limit Subsections (a)(2) and (a)(3). *Cf. Engine Mfrs. Ass'n* v. *S. Coast Air Quality Mgmt. Dist.*,

541 U.S. 246, 257-58 (2004) (noting that a "notwithstanding" clause "might have been nice, but hardly seems necessary" given how the substance of the two statutory provisions determined their interaction). The provisions simply work differently. Because Subsection (b)(1) plainly specifies the circumstances under which a person "may not serve" as an acting officer, there was no need for it to reference the permissive provisions of Subsections (a)(2) and (a)(3). Congress often uses the phrase "may not serve" in this way to effectively limit—without using any "notwithstanding" clause—the President's ability to place individuals in office. See, *e.g.* 42 U.S.C. § 1395kkk(g)(2)(A) (providing that, though the President has the power to appoint members of the Independent Payment Advisory Board, "a member *may not serve* more than 2 full consecutive terms" (emphasis added)); 54 U.S.C. § 304101(c) (providing that, though President has the power to appoint members to the Advisory Council on Historic Preservation, "[a]n appointed member *may not serve* more than 2 terms" (emphasis added)).

A broader "notwithstanding" clause is also unnecessary because Subsection (b)(1) explicitly applies to "this section." As the D.C. Circuit recognized, Subsection (b)(1)'s use of "the phrase 'this section' plainly refers to section 3345 in its entirety," thereby making a person's ability to serve under § 3345(a)(2) and (a)(3) subject to the conditions in Subsection (b)(1). Pet. App. 12a. Broadening the "notwithstanding" clause would simply have created redundancy in the statute.

Moreover, the D.C. Circuit's reading aligns with the "usual rule" that "when the legislature uses cer-

tain language in one part of the statute and different language in another, the court assumes different meanings were intended." *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 712 n.9 (2004) (internal quotation marks omitted). Here, the use of introductory "notwithstanding" clauses in Subsections (a)(2), (a)(3), (b)(1), and (c)(1) contrasts sharply with the use of the introductory "For purposes of" clause in Subsection (c)(2). See 5 U.S.C. § 3345(c)(2) ("For purposes of this section * * * the expiration of a term of office is an inability to perform* * *"). Following the plain meaning of "notwithstanding" ensures that those different clauses receive different meanings.

3. The Government's Alternative Wording Arguments Fail

The government also makes a number of counterfactual arguments based on language Congress did *not* enact in Subsection (b)(1)'s "notwithstanding" clause. It asserts that, if Congress had intended for Subsection (b)(1) to apply to all of Subsection (a), it would have said "notwithstanding any other provision of law," Pet. Br. 31, or "[n]otwithstanding subsection (a),' or '[n]otwithstanding subsections (a)(1), (a)(2), and (a)(3)," Pet. Br. 33. Those arguments do not withstand scrutiny.

While the government asserts that Subsections (a)(2) and (a)(3) "are just as categorical as Subsection (a)(1)," Pet. Br. 32-33, those provisions do not use the mandatory term "shall." There is thus no need for a "notwithstanding" clause to prevent them from affecting Subsection (b)(1). And given the narrow sweep of Subsection (b)(1), it is perfectly sensible that Congress did not use the phrase "[n]otwithstanding any other provision of law." Pet. Br. 31. Subsection (b)(1)

specifies that it applies to "a person * * * serv[ing] as an acting officer * * * *under this section*." 5 U.S.C. § 3345(b)(1) (emphasis added). Because Subsection (b)(1) is limited in scope to a single section, it would have been nonsensical to include a wide-ranging "notwithstanding" clause that swept in every section of all fifty-two titles of the United States Code. Indeed, the government acknowledges that, when it comes to "notwithstanding" clauses, more "precise provisions" are preferable. Pet. Br. 31. The government's argument also fails to account for 5 U.S.C. § 3347(a), which establishes that certain statutory provisions provide alternatives to the FVRA. Using an omnibus "notwithstanding" clause would unnecessarily conflict with that provision.

The government's arguments are also undercut by lengthy congressional practice. There are numerous Code provisions in which a subsection or paragraph with a mandatory "shall" is followed by a provision containing "notwithstanding" language to ensure that the mandatory provision does not override permissive language in a neighboring provision. See, *e.g.*, 7 U.S.C. § 6d (paragraph (2) provides that funds of a swaps customer and the futures commission merchant "shall not" be commingled, while subparagraphs (3)(a) and (b) provide that funds "may" be commingled in certain conditions, "[n]otwithstanding paragraph (2)"); 15 U.S.C. § 80a-56 (subsection (d) provides that "it shall be unlawful" for noncontrolling shareholders or affiliates to conduct certain transactions, while subsections (f), (g), and (j) permit certain transactions "[n]otwithstanding subsection (d)").[14]

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[14] See also, *e.g.*, 10 U.S.C. § 125(a), (b), (c) (similar); 15 U.S.C. § 80a-17(a), (b), (c) (similar).

The government tellingly cannot offer a *single instance* of another statute containing an introductory "notwithstanding" clause that has the same effect it claims is present here—restricting the meaning of the clause it introduces.

B. The Plain Meaning Of "A Person" In Subsection (b)(1) Makes Clear That It Applies To Individuals Other Than First Assistants Serving Under Subsection (a)(1)

By its plain terms, Subsection (b)(1) applies to acting officers serving under (a)(2) and (a)(3) because it provides that "*a person* may not serve as an acting officer for an office under this section." 5 U.S.C. § 3345(b)(1) (emphasis added). The broad scope of the word "person" plainly covers more than "the first assistant" referenced in Subsection (a)(1).

To begin, the phrase "a person" is expansive. As this Court has noted frequently, the term "person" has "a broa[d] meaning in the law." *Mohamad* v. *Palestinian Auth.*, 132 S. Ct. 1702, 1708 (2012); accord *Pfizer* v. *Gov't of India*, 434 U.S. 308, 312 (1978) ("the phrase 'any person'" has a "naturally broad and inclusive meaning"). And the "indefinite or generalizing force of 'a'" confirms the breadth intended for the term "person." *Am. Bus Ass'n* v. *Slater*, 231 F.3d 1, 5 (D.C. Cir. 2000); *In re Cardelucci*, 285 F.3d 1231, 1234 (9th Cir. 2002) (same). Thus, Congress intentionally made the object of Subsection (b)(1) broad.

In contrast, the term "the first assistant" is very narrow. A "first assistant" is not just any "person," but someone who holds a particular position that does not always (or even usually) exist for many statutory offices. Moreover, the use of "the definite article" un-

derscores that there is "only one" first assistant for purposes of Subsection (a)(1). See *Rumsfeld* v. *Padilla*, 542 U.S. 426, 434 (2004); *Rapanos* v. *United States*, 547 U.S. 715, 732 (2006) (plurality opinion) ("[t]he use of the definite article" indicates a "narrow[er]" reference).

For at least two reasons, the broader statutory context confirms that Congress used the term "person" in Subsection (b)(1) to reach beyond Subsection (a)(1) to individuals acting under (a)(2) and (a)(3).

First, giving "person" its naturally expansive meaning is faithful to the bedrock rule of construction that the same word should generally have the same meaning within a particular statute, and different terms should have different meanings. See *Powerex Corp.*, 551 U.S. at 232; see also *Sosa*, 542 U.S. at 712 n.9 (presuming "different language" in different parts of a statute indicates "different meanings"). Doing so ensures that the term "person" is given the same meaning in Subsections (a)(2) and (b)(1). See 5 U.S.C. § 3345(a)(2), (b)(1). And it gives meaning to the very different terms used in Subsections (a)(1) and (b)(1)—"the first assistant" and "a person."

Second, Congress consciously used different levels of specificity in defining the objects of Section 3345's various subsections, confirming that "a person" in (b)(1) has broad effect. Subsection (a)(1) uses the phrase "the first assistant" because it identifies the particular individual who should be elevated automatically to acting status when a vacancy arises. See 5 U.S.C. § 3345(a)(1). Subsection (a)(2) uses the broader term "person" to ensure that all eligible PAS officials are covered. *Id.* § 3345(a)(2). Subsection (a)(3) uses "officer or employee" because it is limited

to those individuals who have held positions within the agency. *Id.* § 3345(a)(3). And Subsection (c)(1) uses "officer" because it is limited to those individuals who have already occupied the office in question and are being reappointed. *Id.* § 3345(c)(1). Given the precision with which Congress defined the objects of all the surrounding subsections, it is only logical to conclude that Congress intended the breadth of scope that follows from using the broad term "person" in Subsection (b)(1).

C. The Plain Meaning Of "This Section" Establishes That Subsection (b)(1) Applies To Subsections (a)(2) And (a)(3)

When Subsection (b)(1) states that "a person may not serve as an acting officer for an office under *this section*," 5 U.S.C. § 3345(b)(1) (emphasis added), the term "this section" can have only one possible meaning: all of Section 3345.

The term "section" has a specific meaning in the "hierarchical scheme" that Congress uses in drafting federal statutes. See *Koons Buick Pontiac GMC, Inc.* v. *Nigh*, 543 U.S. 50, 60 (2004). A "section" is comprised of subsidiary "subsections," "paragraphs," "subparagraphs," and "clauses." See *id.* at 60-61 (quoting the House's and Senate's drafting manuals). So "section" is the "naming convention[]" for the "most fundamental division" of the statute. See M. Douglass Bellis, *Statutory Structure and Legislative Drafting Conventions: A Primer for Judges* 7-8 (2008). Here, the term refers to the entire "division" falling under the "designation" of Section 3345. *Id.* at 8.

The FVRA's numerous and reticulated cross-references confirm that Congress used "this section"

in its ordinary sense. As the Ninth and D.C. Circuits both noted, Congress was precise in inserting internal cross-references into the FVRA. See *Hooks*, 816 F.3d at 559 (collecting the FVRA's uses of "section," "subsection," and "paragraph"); Pet. App. 12a. Crucially, all of those cross-references follow the established "naming conventions" for "basic subdivisions of federal laws" described above. Bellis, *supra*, at 7. This consistent and precise usage forecloses the government's assertion that "this section" means "Subsection (a)(1)." Pet. Br. 33.

The government's interpretation would again violate the rule that the same words, used in the same statute, carry the same meaning. See *Powerex Corp.*, 551 U.S. at 232. Indeed, every time the FVRA uses the phrase "this section" or the term "section," it refers to the section *in its entirety*, not to a particular subsection or paragraph within that section. For instance, Subsection (c)(2) uses "this section" to reference all of Section 3345 when it defines "the expiration of a term of office" "[f]or purposes of *this section* and *sections* 3346, 3347, 3348, 3349, 3349a, and 3349d." 5 U.S.C. § 3345(c)(2) (emphasis added). So too for the 14 other occurrences of "section," see *id.* § 3345(a)(1); *id.* § 3345(a)(2); *id.* § 3345(a)(3); *id.* § 3347(a); *id.* § 3348(b); *id.* § 3348(c); *id.* § 3348(d)(1); *id.* § 3349(a)(1); *id.* § 3349(b); *id.* § 3349a(a); *id.* § 3349b; *id.* § 3349c; *id.* § 3349d(a); § 3349d(b). Congress plainly did not intend for "section" in Subdivision (b)(1) to have a meaning that is out of step with the fifteen other provisions that use that same term.

CONCLUSION

For these reasons, and those in respondent's brief, the judgment below should be affirmed.

Respectfully submitted.

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